RECORD AND BRIEFS

No. 16-405

FILED
APR - 3 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell, and ROBERT T. NELSON,

Respondents.

On Writ of Certiorari to the Supreme Court of Montana

BRIEF OF BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION/IBT AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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April 5, 2017

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Brotherhood of Maintenance of Way Employes Division/IBT ("BMWED") is an unincorporated labor association that is the collective bargaining representative of nearly 40,000 railroad employees working in the class or craft of maintenance of way employee under Section 1, Sixth of the Railway Labor Act ("RLA"), 45 U.S.C. § 151, Sixth, including employees of Petitioner BNSF Railway Company ("BNSF"). Among other things, BNSF's maintenance of way employees represented by BMWED are responsible for constructing, repairing, rehabilitating, upgrading, renewing, inspecting and maintaining the railroad's track and right of way, as well as bridges, buildings, and other structures. JA 28; *History*, BMWED-IBT, https;//www.bmwe.org/secondary.aspx?id=22 (last visited Mar. 29, 2017). BMWED was the collective bargaining representative of Brent T. Tyrrell, decedent of respondent Kelli Tyrrell. Brent Tyrrell was employed by BNSF as a maintenance of way worker in various states where BNSF owns and operates rail lines. Pet. App. 10a.[1]

BNSF maintenance of way workers generally do not work at a particular location or local geographic area; many of them are assigned to "traveling gangs."

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[1] Pursuant to Supreme Court Rule 37.3, BMWED states that both Petitioner and Respondent parties have filed general consents for the filing of amicus briefs in this case. Pursuant to Rule 37.6, BMWED states that no counsel for any party authored this brief in whole or in part; and no entity or person, aside from BMWED, made any monetary contribution toward the brief's preparation or submission.

JA 30. Many BNSF traveling gangs work across the BNSF system which covers 28 states. BNSF "production gangs" (traveling gangs that are large and mechanized and resemble mobile assembly lines to rehabilitate or build rail lines) work across multiple states (including Montana); certain gangs cover the entire BNSF system. JA 30-31. During the work season, many traveling employees are often hundreds of miles from their homes at the end of a work week, sometimes they may be over a thousand miles from home. *Bhd. of Maint. of Way Emps. v. Atchison, Topeka & Santa Fe Ry. Co.*, No. 96–1515, 1996 WL 904755, at *1 (C.D. Ill. Dec. 17, 1996), *rev'd on other grounds*, 138 F.3d 635 (7th Cir. 1997). Accordingly the workplace for BNSF maintenance of way workers is the entire BNSF system.

As collective bargaining representative of BNSF maintenance of way workers, BMWED is responsible for ensuring that BNSF complies with its collective bargaining agreements with BMWED, but also that BNSF maintenance of way workers have a safe and healthy work environment and that BNSF complies with various federal laws that protect railroad workers, including the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, BMWED and its members have an interest in ensuring that the FELA remains effective in promoting safe and healthy working conditions for maintenance of way workers and that they have effective access to the courts to enforce their rights under the FELA, including their ability to seek its enforcement where they have a right to bring suit under FELA Section 56. JA 31-32.

SUMMARY OF ARGUMENT

BMWED respectfully submits that the Montana Supreme Court correctly concluded that courts in that state have personal jurisdiction over BNSF for

adjudication of employee claims under the FELA. Because Section 56 of the FELA authorizes courts of a state to adjudicate claims of railroad workers under the federal statute, and to exercise personal jurisdiction over a railroad that does business in the state when an injured worker brings a FELA claim against the railroad, the Montana Supreme Court's decision did not cross the boundaries set by the Fourteenth Amendment for the exercise of state court personal jurisdiction. Additionally, by its substantial, systematic and continuing presence and activities in Montana, BNSF has made itself "at home" in the state. The railroad does not merely engage in commerce in the state just by passing through, generating sales through others, contracting with other parties in Montana, or acting through a subsidiary. BNSF itself has a significant corporate presence in the state. It owns large swaths of land, operates in about two-thirds of the state and is one of the largest private employers in Montana. BNSF is therefore subject to the "general jurisdiction" of the Montana courts under *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

ARGUMENT

I. THE FEDERAL EMPLOYER'S LIABILITY ACT CONFERS ON STATE COURTS PERSONAL JURISDICTION OVER ACTIONS AGAINST RAILROADS FOR ENFORCEMENT OF THE FEDERAL LAW

As the Montana Supreme Court observed, the FELA was specifically amended to provide that a claim may be brought in a district court in a district where a railroad is doing business, and that jurisdiction of state courts over FELA causes of

action is concurrent with the jurisdiction of the district courts. *See* Pet. App. 6a (citing 45 U.S.C. § 56). Furthermore, the Montana Court correctly noted that this Court has repeatedly recognized that state courts have jurisdiction over FELA cases under Section 56 when the only basis for jurisdiction is that the railroad is doing business in the state. *Id.* at 8.

In asserting that the Montana courts erred by exercising general personal jurisdiction over the railroad, BNSF misunderstands the basis for the Montana Supreme Court's decision. The Montana Supreme Court did not hold that courts in the state have general personal jurisdiction over BNSF for causes of action under state law. Rather, it held that BNSF is subject to personal jurisdiction in courts in the state for causes action under the federal statute which provides that state courts have jurisdiction over such claims, if a state chooses to assume such jurisdiction. That holding is fully consistent with the decisions of this Court in *Denver & Rio Grande Western Railroad Co. v. Terte*, 284 U.S. 284 (1932), *Miles v. Illinois Central Rail Co.*, 315 U.S. 698 (1942), and *Pope v. Atlantic Coast Line Railroad Co.*, 345 U.S. 379 (1953), in which the Court rejected challenges to the rights of railroad workers to bring FELA actions against their employers in state courts based on the railroads doing business in those states. BNSF notes that those decisions were issued decades ago. But the substance of Section 56 remains as it was when those cases were decided; and the FELA has not been otherwise amended to lessen its jurisdictional scope. BNSF also argues that these decisions did not mention personal jurisdiction under the Due Process Clause. *See* Pet. Brief at 40. But they each dealt with challenges to the ability of state courts to hear FELA claims against railroads that

were merely doing business in the forum states; each recognized that the FELA authorization for jurisdiction over railroads doing business in a state applies to state courts as well as federal courts, and nothing in those decisions suggests that only subject matter jurisdiction was at issue. And *Miles* and *Pope* both cited Section 56 as the basis for jurisdiction in the state courts. 315 U.S. at 703-04, 345 U.S. at 386.

BNSF also asserts that Section 56 is merely a venue provision that does not provide a basis for personal jurisdiction. Pet. Brief at 28-29. In doing so, BNSF has mischaracterized the above cited decisions of this Court and Section 56. The decisions in *Terte*, *Miles*, and *Pope* all upheld state court exercise of jurisdiction over FELA claims against railroads on the basis that the railroads were doing business in the respective states. *Miles* is particularly apt here. A Tennessee resident brought suit in Missouri state court against an Illinois railroad over an accident that occurred in Tennessee; the Court considered the "substantial business" done by the railroad in Missouri (including daily passenger trains, freight trains, offices in Missouri, and receipts from business in Missouri) and concluded that, under *Terte*, the railroad could properly be sued in Missouri. 315 U.S. at 701. The *Miles* Court also noted the distinction between jurisdiction under FELA and venue, with jurisdiction derived from Section 56, and venue derived from the practice of the forum state. *Id.* at 703.

By its terms, Section 56 is grant of jurisdiction for adjudication of FELA cases, and it explicitly provides that the jurisdiction of state courts over FELA claims is concurrent with that of the federal courts, where jurisdiction is proper wherever a railroad is doing business at the time the claim is brought. BNSF

asserts that "'concurrent' jurisdiction as used in Section 56 has always been understood to refer to subject-matter jurisdiction, not personal jurisdiction." *See* Pet. Brief at 37 (emphasis in original) (referring to the Court's statement in *Growe v. Emison*, 507 U.S. 25, 32 (1993) that "federal courts and state courts often find themselves exercising concurrent jurisdiction over the same subject matter"). But, *Growe* does not support the assertion that concurrent jurisdiction always means subject matter jurisdiction. *Growe* concerned two cases challenging redistricting by Minnesota: one was brought in state court under the federal and state Constitutions, the other case also included a federal statutory claim under the Voting Rights Act, 42 U.S.C. § 1973. The quoted passage referred to state and federal courts having jurisdiction over the same "subject matter" in the sense of hearing claims dealing with the same dispute or problem; the court was not referring to "subject matter jurisdiction." *See also Emison v. Growe*, 782 F. Supp. 427, 430 (D. MN 1992) (finding that court had subject matter jurisdiction under 28 U.S.C. §§ 1343 and 1331 and 42 U.S.C. § 1973, which do not provide subject matter jurisdiction to state courts), *vacated on other grounds*, 507 U.S. 25 (1993). So this Court's statement that the two cases concerned the same subject matter could not mean that the basis for subject matter jurisdiction was the same in each case, rather, they arose out of the same "subject," the Minnesota redistricting. In any event, *Growe* does not support the expansive assertion that concurrent jurisdiction always means subject matter jurisdiction. And references in *Pope*, 345 U.S. at 385, and *Baltimore & Ohio Railroad Co. v. Kepner*, 314 U.S. 44, 53-54 (1941) to Section 56 providing for venue does not mean that Section 56 is not also a

grant of jurisdiction. Thus, Section 56 provides state courts with jurisdiction to hear and decide claims under the Federal statute, including personal jurisdiction over railroads doing business in the states; if BNSF objects to that arrangement, its recourse is to Congress, not to seek to invalidation of the statute in the courts.

Because BNSF has misunderstood the basis for the Montana Supreme Court's decision, BNSF's reliance on decisions such as *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984) and *Goodyear*, is misplaced. Those decisions concerned state tort law claims asserted in state courts against corporations that had little or no contact with the states. *See Goodyear*, 564 U.S. 915 (involving foreign subsidiaries of an American company where the subsidiaries had no activity in North Carolina and only put products of the type at issue in that case in the general "stream of commerce"), *Helicopteros*, 466 U.S. 408 (involving a foreign company that did not have a place of business and was not licensed in Texas, did not conduct its business there, its officers merely came to Texas to negotiate a contract and purchase products, and it accepted checks drawn on Texas banks). Those decisions did not involve claims in state courts under a federal law that provided state courts with the same jurisdiction provided to federal courts. And BNSF has cited no decision in which the Fourteenth Amendment was held to preclude state court exercise of personal jurisdiction over a defendant when a claim based on federal law was brought in a state court, where the federal law authorized state courts to exercise personal jurisdiction under that law.

BMWED also submits that Petitioners were correct in arguing that acceptance of BNSF's view of

the law would mean that employees, including Montana resident employees, could not sue BNSF under the FELA in the United States District Court for the District of Montana, even though BNSF is doing business in Montana within the meaning of FELA Section 56, because the Federal court would have to rely on the Montana long-arm statute to assert personal jurisdiction over BNSF. Opp'n to Cert. at 18-19. Furthermore, under BNSF's interpretation of the Fourteenth Amendment and the FELA, the only state courts that would have general jurisdiction over a FELA claim against a railroad would be state courts where the railroad was incorporated and where the railroad maintained its principal place of business. And to the extent that District Courts would rely on state long arm statutes for personal jurisdiction, the logical result of BNSF's argument is that the only District Courts that would have personal jurisdiction over a railroad would be the ones located in the states where the railroad was incorporated and where the railroad maintained its principal place of business. That outcome would be plainly contrary to the intent of Congress in adding Section 56 to the statute, effectively negating the 1910 amendment.

As the Montana Supreme Court recognized, the FELA was passed and amended to address "the special needs of railroad workers" arising from the particular hazards of railroad work, Pet. App. 5a, (citing *Sinkler v. Missouri Pacific Railroad Co.* 356 U.S. 326, 329 (1958)), and this Court has therefore construed the statute broadly in favor of injured railroad workers in order to accomplish the humanitarian and remedial purposes of the FELA. Pet. App. 6a (citing *Labella v. Burlington N., Inc.*, 595 P.2d 1184, 1186 (1979)). BNSF's argument is

particularly inconsistent with the expressed intent of Congress in amending the FELA by adding Section 56 to ensure that employees can bring FELA actions in states where the railroads do business even if they are not headquartered or incorporated in those states. *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941). Reversal of the Montana Supreme Court's decision would mean that BNSF employees who live and work in 28 states in the Midwest and West could only sue BNSF in Delaware and Texas; and it would therefore deprive employees represented by BMWED of their rights under the FELA to bring suit against a railroad where the railroad does business.

BMWED members perform very strenuous and physically challenging work in very hazardous work environments across whole regions of the United States, many are assigned to gangs that cover two-thirds of the country. The FELA grants them the right to bring their claims against railroads under the federal statute in state courts where the railroads are doing business, not just where the railroad is incorporated or maintains its principal office. The Montana Supreme Court's decision is consistent with the language and mandate of the FELA; the position advocated by BNSF would undermine the FELA and deprive BMWED members of their statutory rights and it is not supported by the Fourteenth Amendment.

II. BNSF IS "AT HOME" IN MONTANA AND THEREFORE PROPERLY SUBJECT TO THE GENERAL PERSONAL JURISDICTION OF THE MONTANA COURTS UNDER *DAIMLER* AND *GOODYEAR*

BNSF argues that the Montana Supreme Court flouted this Court's decision in *Daimler* and *Goodyear* by asserting personal jurisdiction over

BNSF based on its presence and activities in the state. Pet. for Cert. at 14. But BNSF's presence and activities in Montana which are so substantial that they clearly provide a basis for the Montana courts to exercise general personal jurisdiction over the railroad without violating the Fourteenth Amendment; and assertion of such jurisdiction is consistent with *Daimler* and *Goodyear*.

BNSF has read *Daimler* and *Goodyear* too narrowly by arguing that they only permit a state to exercise general personal jurisdiction over corporate defendants that are incorporated or maintain their principal place in the state. *See* Brief of Pet. at 17-18. The Court specifically recognized that there may be cases where a corporation's presence and activities in a state are so significant that the corporation is essentially at home there: where contacts and affiliations with the state are "so 'continuous and systematic,' as to render [it] essentially at home in the forum State." *Daimler*, 134 S. Ct. at 761 (quoting *Goodyear*, 564 U.S. at 919). While the *Goodyear* Court observed that the "paradigm" forum for the exercise of general personal jurisdiction would be the corporation's place of incorporation and principal place of business, 564 U.S. at 924, those were merely paradigms. Those examples were not inclusive of all situations. And the *Daimler* court stated that "*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all purpose forums". 134 S. Ct at 760 (emphasis in original). BNSF has ignored the limitations on the holding in *Goodyear*, and the express caution in *Daimler* against construing *Goodyear* too narrowly, by arguing that place of incorporation and principal

place of business are not mere paradigms, but all inclusive boundaries on state court jurisdiction over corporate defendants.

The facts regarding BNSF's presence in Montana demonstrate that its contacts and affiliations with the state are so substantial, continuous and systematic that BNSF is properly considered "at home" in Montana under *Daimler* and *Goodyear*. As the Montana Supreme Court noted, Pet. App. 17a, BNSF conducts business in Montana by operating trains over more than 2000 miles of track.[2] BNSF maintains traffic offices across the state, owns real estate (in addition to the right of way), and does direct advertising in Montana with Montana media. *Id.* BNSF main lines run across the length of the state in the north, from the eastern border to the southern and central parts of the state, and they connect the northern lines to the south-central part of the state; and BNSF branch and feeder lines reach into the interior of the state; BNSF lines cover about two-thirds of the state and touch virtually every city and major town in the northern, eastern and central parts of Montana. *Montana Rail System*, MONT. DEP'T OF TRANSP., ROAD INVENTORY & MAPPING SECTION (Oct. 8, 2013), https://mdt.mt.gov/travinfo/docs/railmap.pdf.

The Montana Supreme Court also found that BNSF has over 2000 employees in Montana (not including maintenance of way traveling gangs that will work in the state as part of their seasonal

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[2] BNSF's Annual Report to the Montana Public Service Commission for 2013 states that BNSF operates 2748 miles of rail lines in Montana. JA 38. Railroad track sits in a roadbed and right of way which usually extends at least ten feet on either side of the track.

production and maintenance schedules).[3] Pet. App. 17a. By comparison, Montana Rail Link, a railroad operating almost exclusively in Montana, operates a third of the track miles that BNSF does in Montana and it has less than half the number of employees in the state as does BNSF.[4] When assessing the significance of BNSF's affiliation and contacts with the state as an employer, the employment numbers should be considered in the context of total employment in the state. According to the Montana Department of Labor And Industry, in 2013 BNSF was one of 19 private employers in Montana that employed over a thousand people; since BNSF employed over 2000 people in Montana it is reasonable to assume that BNSF is in or near the top 10 private employers in the state. *MT Top 100 Employers*, MONT. DEP'T OF LABOR & INDUS., https://data.datamontana.us/buisness/MT-Top-100Employers/fvb9-zhbc (last visited Mar. 30, 2017).[5]

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[3] A PROGRESSIVE RAILROADING article in October of 2013 (Exhibit 7 to Tyrrell's Opposition to BNSF's Motion to Dismiss in the 13th District Court, Yellowstone County) reported that BNSF employed more than 2200 people in 2013 and was planning to fill another 250 positions. *BNSF Starts Work on Logistics Center in Texas, Opens Economic Development Office in Montana*, PROGRESSIVE RAILROADING (Oct. 23, 2013), http://www.progressiverailroading.com/bnsf_railway/news/BNSF-starts-work-on-logistics-center-in-Texas-opens-economic-development-office-in-Montana--38138.

[4] Montana Rail Link operates has 900 miles of track in Montana and about 1000 employees. *About Montana Rail Link*, MONT. RAIL LINK, https://www.montanarail.com/about.php (last visited Mar. 30, 2017).

[5] The Montana Department of Labor And Industry does not report employment numbers in amounts greater than one thousand. A 2016 article in 247WallSt.com reported that

When one considers that Montana had a total work force of about 440,000 in 2013, and a total private sector work force of about 326,000 in 2011,[6] BNSF accounted for about .5% of total employment in the entire state in 2013, and about .7% of private sector employment in the entire state in 2011. Furthermore, as the Montana Supreme Court observed, the Thirteenth Judicial District, Yellowstone County, found in *Monroy v. BNSF Ry. Co.*, Cause No. DV 13-799 (Aug. 1, 2014) that:

> BNSF has established 40 new facilities in Montana since 2010 and invested $470 million dollars in Montana in the last four years.... In 2010, Montana shipped by BNSF 35.2 million tons of coal, 8.5 million tons of grain and 2.9 million tons of petroleum.... In the last

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Walmart was the largest private employer in Montana with 4508 employees. Evan Comen et al., *The Largest Employer in Every State*, 24/7 WALL ST. (Mar. 11, 2016 1:55 PM), http://247wallst.com/special-report/2016/03/11/the-largest-employer-in-every-state/7/.

[6] According to the United States Bureau of Labor Statistics, 447,180 persons were employed in Montana as of May 2015. *May 2015 State Occupational Employment and Wage Estimates Montana*, U.S. BUREAU OF LABOR & STATISTICS, https://www.bls.gov/oes/current/oes_mt.htm#00-0000 (last modified Mar. 30, 2016). Total private sector employment in Montana in 2013 was approximately 339,000. *Quarterly Census of Employment and Wages*, U.S. BUREAU OF LABOR & STATISTICS, https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=14&year=2013&size=0,1,2,3,4,5,6,7,8,9&hlind=10&supp=1 (last modified June 2, 2016).

> year approximately 57,000 BNSF rail cars of grain per year rode the rails in Montana and 230,000 BNSF rail cars of coal per year go out of Montana. In October 2013, BNSF opened an economic development office in Billings, Montana, because of the heightened amount of business not only for coal and grain in Montana, but in particular the Bakken oil development.

Pet. App. 4a (footnote omitted).

Thus, BNSF has a substantial, systematic and continuous presence in Montana and has certainly made itself at home there such that it has rendered itself subject to personal jurisdiction in the Montana courts.

BNSF's presence in Montana is far greater than was the presence of the corporate defendants in *Daimler* and *Goodyear*. The claim of personal jurisdiction over against Daimler AG was not predicated on its presence, activities or actions in California, but on those of its subsidiary; the Court described Daimler AG's contacts with California as "slim." 134 S. Ct. at 760. In *Goodyear*, the foreign subsidiaries of the parent company were not registered to do business in North Carolina; they had no places of business, employees, or bank accounts in the state; they did not design, manufacture or advertise products in the North Carolina and did not solicit business or ship tires to North Carolina, although a small percentage of tires manufactured

by the subsidiaries were distributed in the state by Goodyear retailers as a result of custom orders. 564 U.S. at 921. This Court referred to those connections to North Carolina as "attenuated," *id.* at 929, and it rejected the North Carolina court's assertion of personal jurisdiction over the foreign subsidiaries based on their placing their tires in the "stream of commerce" that ultimately carried them to North Carolina, *id.* at 926-27.

BNSF's presence in, and affiliation with, Montana are of a completely different order than the presence and affiliations Daimler AG and the Goodyear subsidiaries had with California and North Carolina; BNSF's connection to Montana is neither "slim" nor "attenuated," it is indeed substantial, systematic and continuous. The Fourteenth Amendment concerns that animated the decisions in *Daimler* and *Goodyear* are not present here. BNSF is not like a mail order company that just ships goods to persons in the state, an appliance manufacturer whose products are merely sold in retail stores in the state, or a transcontinental trucking company who whose drivers only stop in the state for gas and lodging. From their respective beginnings, the railroad has been intertwined with the development of the state. BNSF's predecessors, the Great Northern Railroad and Northern Pacific Railroad, were engaged with Montana before it even was a state,; and they were largely responsible for populating it, and facilitating

its economy.[7] BNSF's own recounting of its history states that the Great Northern Railway laid the rails in the Northwest first and then sought to "colonize" the surrounding areas with farmers and ranchers, describes the pre-railroad Montana as "virtually uninhabited"; and Northern Pacific is depicted as playing a major role in the settling of Montana and the Dakotas and in their admission to statehood. *The History of BNSF: A Legacy for the 21st Century*, BNSF RY., http://www.bnsf.com/about-bnsf/our-railroad/company-history/pdf/History_and_Legacy.pdf (last visited on Mar. 30, 2017), at *20, 30-35.

Over the decades through the present, BNSF has been a major factor in Montana's development and economy; it remains a major landowner, employer and engine of economic growth in the state; it extracts substantial revenue from the transport of natural resources from Montana and derives over $1.7 billion from operations in Montana. JA 37. BNSF is indeed at home in Montana, and the Montana courts properly asserted general personal jurisdiction over BNSF in the FELA cases brought by Mr. Nelson and on behalf of Mr. Tyrrell.

CONCLUSION

For the foregoing reasons, the decision of the Montana Supreme Court should be affirmed.

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[7] RICHARD WHITE, RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA, 455-66, 495 (W.W. Norton & Co. ed., 2011); DEE BROWN, HEAR THAT LONESOME WHISTLE BLOW: THE EPIC STORY OF THE TRANSCONTINENTAL RAILROADS, 266-77 (Henry Holt & Co. ed., 1977).

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April 5, 2017